Arthur L. Davis v. U.S. General Accounting Office

Docket No. 01-04

Date of Decision: October 22, 2003

Cite as: A.Davis v. GAO

Before: Jeffrey S. Gulin, Member

Prohibited personnel practice

Retaliation

Performance appraisal

Suspension

Reprisal

Disparate treatment

DECISION

This matter is before the Personnel Appeals Board (PAB or the Board) on a Petition for Review filed by Arthur L. Davis, a Band II analyst assigned to the Tax Administration and Justice Team (TAJ) in the San Francisco Office of the Respondent, the U.S. General Accounting Office (GAO or the Agency). Initially proceeding *pro se*, Petitioner alleged that Agency officials committed prohibited personnel practices when they suspended him for two days and prepared performance appraisals that did not accurately reflect his performance. He charged that the suspension and performance appraisals were based on retaliation for his active participation in protected activities. He also specifically alleged that his performance appraisals were "improperly assessed because of bias and reprisal." Petition at 1. Petitioner requested rescission of the suspension, restoration of lost pay, adjustment of his performance ratings, expungement of related personnel records, and compensatory and punitive damages. *Id.* at 13.

I. Background

A. Procedural History

The Petition for Review was filed by Petitioner, *pro se*, on February 13, 2001. Following several extensions of the discovery period, on July 9, 2001, Petitioner filed a Motion asking for recusal of the Administrative Judge (AJ) assigned to the case and the entire Personnel Appeals Board

based on a purported conflict of interest.[1] After several more discovery-related filings from both parties, Petitioner retained counsel who, on September 17, 2001, renewed the recusal Motion although there had not yet been a ruling on the earlier Motion. He simultaneously sought reconsideration of a previous discovery Order (Aug. 24, 2001).

In a September 28, 2001 Order, the AJ denied the pending recusal Motions as well as reconsideration of the discovery matter. Petitioner filed an interlocutory appeal of the decision on recusal to the full Board on October 17, 2001. On November 7, 2001, the Administrative Judge denied the appeal as untimely, noting, as well, that the claim underlying the appeal failed to meet the substantive requirements for interlocutory review. *See* 4 C.F.R. §28.81.

A status conference was held on November 16, 2001, for the purpose of scheduling an evidentiary hearing on the issues raised in the Petition. Petitioner's counsel stated unequivocally and repeatedly during the status conference that he and his client did not wish to schedule a hearing and would not participate if one were to be scheduled. As a result, on December 7, 2001, the AJ ordered Petitioner to show cause why his Petition should not be dismissed for failure to prosecute the claim he had filed.

Petitioner filed his Response to the Show Cause Order on January 4, 2002, agreeing to participate in a hearing on the merits of the case but also asking: (1) that the PAB dismiss the instant case and allow Petitioner to re-file his Petition subsequent to adjudication of allegedly similar claims involving Petitioner pending in a case before the U.S. District Court for the District of Columbia; or (2) that the matter be stayed pending resolution of the District Court case. The Agency filed a Response arguing that the Petition should be dismissed for failure to prosecute. By Order of March 27, 2002, the AJ denied both parties' requests for dismissal but granted a stay for six months.

A telephone conference was held on October 9, 2002, and the evidentiary hearing was scheduled for January 2003. At Petitioner's request, the hearing was further delayed until February 25, 2003. During the hearing, the Agency offered more than 200 exhibits into evidence; Petitioner's counsel submitted no exhibits by the required pre-trial filing deadline and offered none of his own during the hearing. After the three-day hearing, the parties agreed to present oral closing arguments in lieu of written briefs. Closing arguments were heard on March 5, 2003.

On March 12, 2003, Petitioner filed a Motion to Reopen Record to Receive Supplemental Evidence, based upon his discovery of a standard operating procedure used by GAO to perform data analysis. The Agency filed its Opposition on March 13, 2003. On March 14, 2003, the AJ denied Petitioner's request, because he had failed to show that the evidence was not available prior to the closing of the record.

On March 14, 2003, Petitioner filed a Motion for New Trial based, in large part, on newly discovered evidence. The Agency filed its Opposition on March 18, 2003. The Administrative

[1] As a basis for his recusal Motion, Petitioner claimed that he is "presently suing the PAB." Motion at 1. As the Agency pointed out in its Response (Jul. 27, 2001 at 2) and the Administrative Judge noted in his Order (Sept. 28, 2001 at 3), the Board is not a party to any lawsuit involving Petitioner.

Judge, in a March 31, 2003 Order, agreed with the Agency's argument that the evidence was neither material nor relevant and further, did not even exist until October 2002, well after the time period during which the performance appraisals at issue were prepared. Order at 2.

B. Factual Background

1. Petitioner's Employment Background

Petitioner began his employment with GAO in 1973. Hearing Transcript (Tr.) 27. During his 30 years with the Agency, he has worked in the areas of defense logistics, income security, tax policy and energy development. Tr. 28.
Prior to the suspension here at issue, Petitioner had never been the subject of any disciplinary action. Tr. 549. There is no evidence in the record of any prior conduct-based action or documented reprimands involving Petitioner.

According to Ralph Block, his supervisor of 15 years, Petitioner had the general reputation of an employee who "meets expectations" as to the quality of his work.[2] Tr. 452. His performance rankings for 1992 to 1999 consistently placed him in the lowest 15% of Band IIs; his pay for performance category during this period was "acceptable" for five years and "commendable" for three. *See* Respondent's Exhibit (R.Ex.) 208.

In addition to his assigned duties, Petitioner was an active member and—eventually—Chair, of the Advisory Council on Civil Rights (ACCR), a chartered employee organization within GAO. Tr. 29. His ACCR duties included assisting in civil rights advocacy at the Agency (Tr. 28-30), and commenting on and seeking answers to various personnel-related matters. Tr. 30, 66.

Petitioner also was a member of an Agency-wide class of black employees who sued GAO for race discrimination in the 1980s. Tr. 20, 31-32. In 1998, he petitioned the U.S. District Court in Washington, D.C. to allow him to intervene in an age discrimination case pending against the Agency.[3] Tr. 20, 32, 553.

According to Petitioner, in approximately early 1999, "comments were made" by two of his supervisors—Ralph Block and Jim White—pertaining to his civil rights activities. Tr. 32. The gist of the remarks was to the effect of "you have better things to do." Tr. 33. He also claimed that the Comptroller General had sent him an e-mail "regarding the disabled veterans, as well as the age discrimination thing" to the effect that he should "cut it out." Tr. 144. Petitioner believed that there was a vendetta against him, that the actions that are the subject of this case were taken in reprisal for his activities. Tr. 548, 552-53.

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[2] Petitioner's appraisal for fiscal year 2000 is consistent with this view, reflecting a rating of "fully successful" in the six dimensions on which he was rated. R.Ex. 7; *see* Tr. 66.

[3] According to counsel, as of the opening of trial, Petitioner's request to intervene was still pending. *See* Tr. 20. That matter led to the six-month stay of proceedings in the instant case during 2002. *See* discussion *supra* at 2-3.

2. The IRS Seizure Job

During the 1999 performance appraisal year, Petitioner was assigned to a four-person San Francisco team of GAO employees collecting data about the process the Internal Revenue Service (IRS) uses in seizing assets of delinquent taxpayers (the "seizure" job). Tr. 35-37, 204. The project had other groups in other locations performing related work. Tr. 37.

Ralph Block, a Band III core group manager for the tax area, prepared written expectations for Petitioner and other staff on the seizure job. Tr. 460-62. He gave Petitioner his expectations. Tr. 474. At the hearing, Petitioner claimed not to have received or read expectations for the job. Tr. 134. Petitioner was evasive when asked why he had not followed up to secure expectations, since it would have been standard GAO procedure: "It's not my job." Tr. 562. Moreover, there was testimony that Petitioner had participated in the development of the data collection instrument (DCI) and planning of the job. *See* R.Ex. 131; Tr. 130-40. On this issue as to whether Petitioner was provided written expectations, I credit Mr. Block's testimony and find Petitioner's testimony not credible.

The written expectations described the project as entailing the development, testing, and completion of DCIs on individual instances of seizure and obtaining related information from IRS officials. Tr. 208; R.Ex. 131. For Petitioner, it included specifically the completion of approximately 60 small DCIs for low dollar seizure cases and 10 general assessment or long DCIs as well as review of other staff members' DCIs. R.Ex. 131. Petitioner completed the extraction of data for 26 of the files for which the team was responsible. Tr. 38.

Tom Richards, based at headquarters, served as the Evaluator-in-Charge (EIC) of the seizure job and made site visits to San Francisco during its course. Tr. 41, 45. James White, as Issue Area Director for Tax, Policy and Administration, had higher level responsibility for the project. Tr. 201. Thomas Venezia, a senior analyst, served as an advisor to the EIC. Tr. 505. Ann Lee was deputy project manager for the seizure project, *i.e.*, she was responsible for the work done in San Francisco. Tr. 462. In addition to Petitioner and Ms. Lee, two other staff members worked on the job as part of the San Francisco team. Tr. 37. Thomas Schulz was the San Francisco Regional Manager during the relevant time. R.Ex. 180.

During the four and a half months that Petitioner was assigned to the project, Messrs. Richards and Venezia gave him "continuous extensive feedback" about the kinds of mistakes he was making. Tr. 309, 362, 398, 406. He had all the information and instructions pertinent to the job. Tr. 362-63. In addition, Ms. Lee had tried to provide feedback contemporaneous with Petitioner's work on the job. Tr. 399; R.Ex. 14.

Petitioner acknowledged receiving instructions on occasion. Tr. 95. He denied being told that his production was too slow or deficient in any way. Tr. 39. As to the quality of his work, his testimony was at best confusing and at worst conflicting. For example, during one series of questions, Petitioner admitted that Mr. Richards had informed him that some of his inputs were wrong. Tr. 41, 55. Subsequently, he stated that the erroneous inputs had resulted from changes in instructions, and that accordingly, he had been told to revise his DCIs to reflect the changes. Tr. 46, 56. He denied receiving criticism of his performance during the job. Tr. 46. On follow-

up questioning by the Administrative Judge, Petitioner stated that he had not been criticized by Mr. Richards, but merely told to correct his work to reflect changes in instructions made during the job. Tr. 48.

Petitioner was similarly evasive as to Tom Venezia's role. He denied that Mr. Venezia went over some DCIs with him during the job, but on follow-up, stated: "He assisted a number of people. I may have been part of the group then, in terms of giving additional changes. . . ." Tr. 98.

As of January 8, 1999, Petitioner's performance was of concern to his supervisors, and James White reflected in a memo to the file that he had told Tom Richards that he wanted Petitioner "to be successful but we need to give him clear and honest feedback and let him know the quality of his work must improve or he will be taken off the job." R.Ex. 12. Within two weeks, Mr. Richards summarized his review of Petitioner's difficulties with the job and history of reluctance to heed adverse comments, concluding that Petitioner should be released from the job and his work redone by other members of the team. R.Ex. 13. On February 8, 1999, Mr. Richards sent a memorandum to Messrs. White and Schulz containing his recommendation of reassignment and a detailed explanation of his performance on the seizure job to date. R.Ex. 15. This assessment of performance essentially became Petitioner's evaluation for the job. *See* R.Ex. 4.

In verifying Petitioner's draft rating, Jim White, Issue Area Director for TAJ, personally reviewed some of Petitioner's DCIs and talked to several people who "all had the same problem" with Petitioner's DCIs. Tr. 319. From this review, he "saw the number and magnitude and seriousness of the errors that had been made" (Tr. 319) and determined:

> That in many, many cases there were multiple errors. There were so many errors that the DCIs had to be redone by somebody else on the job. They were not usable.

Tr. 216; *see* Tr. 340, 375; R.Ex. 4. He further described the errors in Petitioner's DCIs as "way out of line compared to the other staff on this job."[4] Tr. 415; *see* Tr. 537.

Respondent provided examples of erroneous work on the seizure project. *See* R.Exs. 19, 160-73. Petitioner himself acknowledged that a "team quality control" assessment would have been the basis for the EIC's opinion of his work relative to that performed by other members of the team. Tr. 58; *see* Tr. 330. The quality control process was described by Mr. White:

> We had a process, when the person doing the verification determined that there were so many errors that were made that a

[4] Petitioner's counsel tried to argue that the lack of comparative error rates on the project suggested Petitioner had been targeted for poor performance. *See, e.g.,* Tr. 325-27, 343. Mr. White effectively countered this approach by noting that an error rate "would be adding apples and oranges," adding that "not every line on the form was the same. So an error on one line might not be an error of the same magnitude as an error on another line." Tr. 326. Further, "the same process was applied to everyone on the team." Tr. 326; *see* Tr. 353. Later in the exchange, he noted that "there were so many errors and so many DCIs had to be redone that there was no point in having him continue on the team." Tr. 327.

> new DCI needed to be filled out, then we had a third person come in and verify the second person's work to make sure that your case wasn't the situation, that it wasn't . . . [Petitioner] who was right and the verifier was wrong. . . .
>
> Then, beyond that, you had a person in each location where we were doing this work who is responsible for the overall quality control process that we had in place, and above that person we had the Assistant Director. Both of them were doing some spot-checks as well, so that there was a lot of redundancy in this verification process, and it wasn't one person's word against the other's.

Tr. 330-31.

3. Conduct Issues

On February 12, 1999, Tom Richards spoke with Petitioner and told him that he would be released from the seizure job because of deficient performance in teamwork and data analysis, and that a meeting would be scheduled with Messrs. White and Block, as well as Mr. Schulz. R.Ex. 180. Petitioner told Mr. Richards that he would not meet on the performance issue, *i.e.,* that he would not participate in such a "circus." *Id.*

Petitioner was notified by e-mail on February 18, 1999 that he would be released from the IRS seizure project the following day, assuming that his DCIs and workpapers could be transferred in an orderly manner. R.Ex. 181; Tr. 393. Mr. White suggested that he and Tom Richards meet with Petitioner in order to give him feedback on his performance on the seizure project so that he would not make the same kind of mistakes on subsequent jobs. Tr. 59-61, 235-36, 248-49, 259.

On February 19, 1999, following a number of requests that Petitioner call him, Mr. Richards sent an e-mail to Petitioner suggesting that the meeting with Messrs. White and Schulz take place during the third week of March. R.Ex. 183. Petitioner responded by e-mail dated February 23, 1999, repeating that he "did not participate in circuses." Tr. 252; R.Ex. 183. In the same e-mail, he also advised Mr. Richards not to "push your luck with me because I am not in the mood. . . . I am not sure how much of this push by you is naiveté or plain stupidity." Tr. 143; R.Ex. 183.

Mr. White reported that on February 23, 1999, he left a phone message for Petitioner asking that he return the call to discuss the rating and new assignment, as well as the need for the meeting in mid-March. He also instructed Petitioner immediately to stop sending copies of e-mail exchanges with Messrs. Richards and Schulz to two other team members on the IRS seizure job, Ann Lee and Mary Jankowski. R.Ex. 185. He followed up the same day with another e-mail to Petitioner:

> I feel very strongly about one point I made and am repeating it here so there is no misunderstanding. As I said, your including Ann Lee and Mary Jankowski in the cc-mail exchanges with Tom Richards and Tom Schulz regarding moving you to another

> assignment is unfair to Ann and Mary and wrong. Therefore, I direct you to immediately stop sending Ann and Mary copies of messages on this subject.

R.Ex. 186 (emphasis added).

Petitioner responded by e-mail to Mr. White's message the next day, referring to several court decisions and stating:

> The point being that a message received by an individual, that message is the property of the receiver and not of the transmitter. Likewise, you can distribute this message to anybody you want to and I have no control over it.
>
> I hope that this clears up any concerns that you may have about my receipt of messages and my subsequent actions.

Id. Mr. Schulz promptly sent Petitioner a reply, reminding him of the directive not to involve his colleagues in communication about his dispute with supervisors and Management on the seizure job. He further warned that continued involvement of the colleagues in the dispute and refusal to obey the directive would subject Petitioner to disciplinary action. R.Ex. 187.

Later that same morning, Mr. Schulz sent Petitioner a follow-up message, telling him to "respond either yes or no" as to whether he would comply with the direct order. Petitioner replied as follows: "Tom, you missed the point. Please read the law. There will be no further comment by me on this issue." R.Ex. 188.

After repeatedly requesting Petitioner to meet with his supervisors, Mr. White sent Petitioner an e-mail directing him to attend a meeting with them about his performance and warning that failure to comply would result in disciplinary action. R.Ex. 190; Tr. 246, 262-63, 268. *See also* R.Exs. 184, 192.

4. The March 1999 Performance-Related Meeting

The meeting, attended by Mr. White, Mr. Richards, and Petitioner, took place on March 17, 1999. Tr. 246. During the meeting, Petitioner was formally presented with a performance appraisal covering the period of October 1, 1998 through February 19, 1999. Tr. 61-62, 271; *see* R.Ex. 4. Mr. White described the March 17 meeting as "confrontational;" Petitioner agreed that tempers got hot during the session. Tr. 62, 274.

In the performance appraisal, which encompassed his assignment on the IRS seizure job, Petitioner was rated "needs improvement" in three of the four dimensions on which he was evaluated: data analysis; oral communication; and teamwork, working relationships and equal opportunity.[5] Tr. 78; R.Ex. 4. The appraisal noted that Petitioner had been advised at the end of

[5] Petitioner was rated "fully successful" in the fourth dimension—data gathering and documentation. The narrative portion of the appraisal explained that there was no basis to assess his performance in planning,

the 1998 rating period to improve his teamwork, but that nevertheless, during the seizure job he "did not maintain effective working relationships with other team members by working alone and communicating little with the team." R.Ex. 4 at 2; *see* R.Ex. 15. The narrative cited three examples of deficient teamwork, and noted that Petitioner was "generally unresponsive" to requests from the deputy project manager to discuss DCIs he prepared for timely and accurate revision. R.Ex. 4 at 2. As to data analysis, the narrative explained that Petitioner:

> frequently experienced difficulties in analyzing IRS case files and summarizing the data. . . . For example, in one case 40 data entries involving 10 of the DCI's 28 questions had to be changed. . . . This and other cases . . . showed that . . . Petitioner did not
>
> - Accurately extract straightforward information such as dollar amounts or dates.
> - Clearly identify what had gone wrong in low dollar seizures. . . .
> - Complete data collection instruments when appropriate.
>
> These are not new or atypical problems. . . . the Project Manager during a September 1998 field visit redid a data collection instrument that [Petitioner] had incorrectly completed and went over that instrument line by line with [Petitioner]. [Petitioner] said he understood but his work continued to reflect errors.

Id. Petitioner testified that he neither read nor signed the appraisal because he disagreed with the conclusions therein and he filed no written comments at the time of the appraisal. Tr. 34-35, 62, 75-76, 79.

At the end of the March 17 meeting, Petitioner was asked to attend a follow-up meeting the next day with Mr. Schulz concerning conduct issues. R.Ex. 198 at 2. When Petitioner replied that he did not want to attend such a meeting, Mr. White stated that he was being ordered to do so and that failure to comply could result in disciplinary action. Petitioner acknowledged that suspension might result, and stated that he would turn the matter over to his attorney. *Id.*

Immediately after the March 17 meeting, Messrs. Richards and White prepared a memo to the file, using a staff member's computer and e-mail, that was based on their memories and hand-written notes taken during the meeting. Tr. 272-73. In the e-mail, they recounted instances of Petitioner using profanity, turning his back to them, and gesturing inappropriately during the meeting. Tr. 275-76; R.Ex. 198. Mr. White testified credibly that Petitioner had comported himself so as to do "his best to ignore us," and that "some of what went on in the meeting raise[d] additional conduct issues." Tr. 276.

According to Petitioner, he was working on his computer during the meeting and turned away from Messrs. Richards and White in order to save his work. Tr. 62, 157-58. Petitioner testified that at some point during the meeting, he uttered a phrase from the movie "The Color Purple" but

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written communication, or supervision, because his work "involved case file reviews following a standardized format." R.Ex. 4 at 3.

could not recall it; he denied cursing. Tr. 150-52. He also testified that he could not remember the "common phrase used by southerners" he used at the meeting. The following colloquy occurred between Petitioner and the AJ:

> JUDGE: Perhaps I'm missing something here, sir, but are you saying you don't remember what the phrase is?
> WITNESS: I don't recall exactly what the words were in the phrase, okay, but it is on that tape. I wish I had looked at it again. But it is a fairly common phrase.
> JUDGE: Well, how do you know that's the word you used if you don't even remember the word?
> WITNESS: Because that's what I used. That's what I used at that time.
> JUDGE: As we sit here today, do you remember what word you used originally?
> WITNESS: I don't remember. I really don't.
> JUDGE: But you do remember that it was a word that came from the movie?
> WITNESS: It is.
> JUDGE: How did you make that connection?
> WITNESS: Because when I'm disgusted with something I said that [sic]. I was disgusted and I used that phrase, which sounds like what that is.
> JUDGE: Back then you used it, but since then you no longer use it?
> WITNESS: No, I haven't used it since then.
> JUDGE: Okay.
> WITNESS: I have not been disgusted since then.

Tr. 153-54.

Petitioner's responses to repeated questions on this point were evasive as compared to Mr. White's specific recollection reflected in the contemporaneous memorandum and in his testimony. I find Petitioner's denial of the alleged conduct during the March 17 meeting not credible.

5. The Two-Day Suspension

Based on Petitioner's repeated failures to meet with his supervisors, his abusive language and disrespectful conduct during the March 17 meeting, and other disrespectful communication with supervisors and managers, on April 1, 1999, Mr. White proposed suspending Petitioner for two workdays for unprofessional conduct. R.Ex. 201; Tr. 281-83.

In his April 8 response to the proposed suspension, Petitioner characterized the proposal as a "result of misunderstanding and poor communication on everyone's part." R.Ex. 202 at 6. He denied that he had refused to meet with his supervisor or that he had been given a directive on

February 23 requiring him to meet. *Id.* at 2. He did admit to calling the prospective meeting a "circus" (*Id.* at 5), and "vehemently" denied using the profanity with which he was charged, explaining that "my intent . . . was never to disobey directives . . . or mean any disrespect." *Id.* at 6.

On April 12, 1999, Tom Schulz, as San Francisco Regional Director, issued a letter reviewing the specifications in the proposal, Petitioner's replies thereto, and concluding that suspension for two days was "appropriate and just." R.Ex. 204 at 4. The suspension took place on April 26 and 27, 1999. Tr. 284-85; R.Ex. 204 at 5.

6. The IRS Payroll Job

On February 22, 1999, Petitioner was assigned to the "Delinquent Payroll and Trust Fund Recovery Penalty" job (the "payroll" job). Tr. 422-23. His duties on the project were to conduct interviews with IRS revenue agents and summarize approximately 100 interviews conducted by other GAO staff. Tr. 49, 424; R.Ex. 17.

Ralph Block, core group manager for the seizure job, was Petitioner's supervisor for the payroll job. Tr. 52, 460. He gave Petitioner verbal expectations on how to complete the summary schedules for the payroll job. Tr. 459, 486. He periodically reviewed Petitioner's work and provided him feedback about his progress on the assignment. Tr. 428, 459-60, 491; R.Ex. 17. On May 12, Mr. Block noted that he had cautioned Petitioner about the amount of time it was taking him to summarize interviews. Tr. 428; R.Ex. 17. Petitioner denied receiving any criticism of quality or quantity of work product while the job was ongoing. Tr. 52. Petitioner neither signed nor read the rating for this job, but heard verbally from his supervisor that the assignment had taken him too long. Tr. 53.

During one review, Mr. Block found that the summary materials Petitioner prepared based on some interviews were "either incomplete or inaccurate or both" in 44 of the 54 cases under review. Tr. 429. Based on his observation of Petitioner's work on the payroll job, Mr. Block prepared an interim performance appraisal that covered the period from February 22 to June 30, 1999. Tr. 422, 426; R.Ex. 5.

In that appraisal, Petitioner was rated as "needs improvement" in data gathering and documentation and in data analysis; he was rated as "fully successful" in the remaining four categories. R.Ex. 5. The narrative portion of the appraisal explained that "the main body of work [Petitioner] was responsible for (i.e. summarizing the interviews) was not initially done in an acceptable manner. . . . While his revised products were fully successful, the initial products should not have contained as many errors as were found." *Id.* The appraisal also noted that the data analysis and documentation tasks had taken Petitioner twice as long as had been expected. R.Ex. 5 at 2.

Mr. Block repeatedly placed the appraisal in Petitioner's mailbox in a sealed envelope but, each time, Petitioner returned it unopened. Tr. 426-27. Mr. Block then decided to hold the interim rating and appraise Petitioner for the period from February 22, 1999 to

September 30, 1999, which was the end of the fiscal year and the annual rating period. Tr. 426-27. For that seven-month period, covering the payroll job, Petitioner's performance was rated as "fully successful" in five dimensions and "needs improvement" in only one, "data analysis." R.Ex. 6. The narrative largely reiterated the deficiencies explained in the June 1999 appraisal for the same job, although it focused only on the data analysis dimension. R.Ex. 6 at 3.

Petitioner again refused to either open or sign the performance appraisal. Tr. 241; *see* R.Ex. 6.[6] He also declined to avail himself of the administrative procedure for adding his own comments to the appraisal. Tr. 80. Petitioner's testimony regarding this appraisal was evasive. For example, when asked what the rating was, Petitioner responded: "I never saw it." Tr. 53. On follow-up, he admitted that his supervisor told him orally "that he wasn't happy with my work on this assignment, and I asked him what specifically what [sic] was it that you didn't like. He said, 'well, it took you too long' . . . to do some interviews." Tr. 53. During a feedback meeting on the rating with Messrs White, Block and the associate director for tax issues, Petitioner explained that he would not open, read, or comment on the rating, because the matter was under review by the PAB. R.Ex. 6 at 1. However, at the hearing, he testified that he did not sign the appraisal because he disagreed with it. Tr. 77.

Mr. White testified that while Petitioner's refusal to read or sign his performance appraisal would be "very unusual for other employees; it was not all that unusual for [Petitioner]." Tr. 241.

Both Mr. White and Mr. Block testified that Petitioner's ratings on the seizure and payroll jobs were based on the performance of his duties and that neither his race nor his collateral activities influenced their ratings of Petitioner or the decision to suspend him.[7] Tr. 242-43, 285, 431, 452. Mr. Block further specified that he had "never been told by anyone to give . . . [Petitioner] a hard time." Tr. 496.

II. Analysis

A. Prohibited Personnel Practice Allegations

In his Petition for Review, Petitioner states that he "seeks a finding of intentional reprisal" based on the "prohibitions contained in GAO's orders and regulations, specifically prohibited personnel practices which prohibit reprisals of the nature contained in this case." Petition at 3.

Under 5 U.S.C. §2302(b)(9), it is a prohibited personnel practice to:

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[6] Although Petitioner claimed that there were only two times in his career when he failed to sign his performance appraisal (Tr. 77), he actually failed to sign three: those dated February 19, 1999; June 30, 1999; and September 30, 1999. Tr. 548; R.Exs. 4, 5, 6.

[7] Mr. White, in fact, testified that the supervisors accommodated Petitioner's other activities by ensuring that the number of files Petitioner was assigned on the IRS seizure job could be completed in the amount of time he had available after his ACCR duties. Tr. 243.

take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

* * *

Thus, §2302(b)(9), in relevant part, protects employees because they exercise certain rights, or give assistance to others exercising those rights. *S.Davis v. GAO*, PAB Dkt. Nos. 00-05 and 00-08, slip op. at 30 (2002), *aff'd en banc,* Jul. 11. 2003. To justify reversal of the Agency's action, Petitioner must prove by a preponderance of the evidence that the action was based on a prohibited reason. 4 C.F.R. §28.61(b)(2).[8]

1. Elements of Retaliation Under 5 U.S.C. §2302(b)(9)

Four elements are necessary to successfully establish a claim of retaliation as a prohibited personnel practice: (1) the employee engaged in protected activity; (2) he was subsequently treated adversely; (3) the deciding official had actual or constructive knowledge of the protected activity; and (4) there is a causal connection between the protected activity and the personnel action. 5 U.S.C. §2302(b)(9); *Special Counsel v. Department of Veterans Affairs*, 84 MSPR 314, 316 (1999); *Wildeman v. Department of the Air Force,* 23 MSPR 313, 320 (1984). As to the last factor, a successful claimant must prove that the protected activity was a significant factor in the personnel decision under review. *S.Davis*, PAB slip op. at 31 (2002) (*citing Special Counsel v. Costello,* 75 MSPR 562, 610 (1997), *rev'd on other grounds*, *Costello v. MSPB*, 183 F.3d 1372 (Fed. Cir. 1999); *Special Counsel v. Nielson*, 71 MSPR 161, 171 (1996); *see Redschlag v. Department of the Army*, 89 MSPR 589, 623-24 (2001), *app. dismissed*, 2002 U.S. App. LEXIS 11765 (Fed. Cir.)).

Based on Petitioner's testimony, the protected activities in which he claims he was involved were his active participation in the ACCR, involvement in the ongoing *Chennareddy* case, and class participation in the *Fogel-Mason* case in the 1980s. Tr. 31-32, 553. Petitioner did not develop the evidentiary basis for the view that his ACCR involvement constituted protected activity.[9] Nevertheless, his participation with the organization, including most recently as Chair,

[8] Prior to the beginning of testimony, the Administrative Judge addressed the issue of which party had the burden of proof in this case. Tr. 1-3. Petitioner's counsel argued that the Agency should proceed first and prove that Petitioner's suspension was proper, since GAO initiated the suspension. Tr. 4. The AJ, however, determined that Petitioner's suspension was not an appealable action under 5 U.S.C. §7701(a), which requires that a suspension be at least of two weeks duration. He further concluded that because the cause of action was based on Petitioner's charge that he was subjected to prohibited personnel practices and discrimination based on retaliation for engaging in protected activities, it was Petitioner's initial burden to prove his allegations. Tr. 5-6.

[9] The Agency raised this issue in closing arguments. Tr. 592-93. Petitioner made vague assertions that as a member and then Chair of the ACCR he was involved with "advocacy or otherwise involved in civil

was notorious enough that Management took it into account in making assignments. Tr. 243. I take official notice of the role the ACCR played at GAO and that Petitioner's involvement inherently identified him with the effort to protect others' civil rights. This falls within the provision of §2302(b)(9)(B) that protects an employee "testifying or otherwise lawfully assisting any individual in the exercise of any right granted by any law, rule or regulation."

Petitioner also testified that he was involved during the 1980s as a class member in the *Fogel-Mason* case, a class action suit alleging race discrimination, and that he is an applicant-intervenor in an ongoing age case in federal district court. Tr. 31-32, 553. These clearly constitute protected activities within the meaning of §2302(b)(9).

Petitioner meets the second criterion for establishing retaliation because he was subjected to adverse personnel actions: he was suspended without pay for two days and was given negative performance appraisals, *i.e.,* below the "meets expectations" level in a merit pay system. The suspension and the appraisals constitute actionable injury with materially adverse consequences affecting the "terms, conditions, or privileges of employment or future employment opportunities." *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999). *See also* EEOC Compliance Manual, Section 8, "Retaliation," ¶8-II, D.3 (1998).

The third criterion requires Petitioner to show that his supervisors knew or should have known about his protected activities. It is clear from the hearing testimony that Petitioner's supervisors were indeed aware of his involvement in ACCR. Mr. White specifically testified that Management gave Petitioner assignments that would accommodate his participation in the ACCR, *i.e.,* that could be performed while allowing time for his ACCR duties. Tr. 243. Whether his supervisors were aware of his own litigation activity was not raised during their testimony. Petitioner testified that Management was well aware of his participation in the *Chennareddy* case. Tr. 553. This testimony was not refuted.

2. The Causal Connection Element

The inquiry thus turns to the fourth element of reprisal under §2302(b)(9)—causal connection between the protected activity and the Agency's action. As discussed below, Petitioner failed to prove by a preponderance of the evidence that retaliation was a significant factor in the Agency's actions in this case.

The record contains very little reference to Petitioner's protected activity other than his own testimony as to the theory underlying his case. As to *Fogel-Mason*, Petitioner's participation in that 1980s class action was too long ago to support any inference of retaliation in 1999. *See S.Davis*, PAB slip op. at 34 (2002). Both Messrs. White and Block countered Petitioner's opinion with testimony that Petitioner's civil rights activities were not a consideration in their decision-making. Tr. 243, 431. Furthermore, there was no evidence presented that either Mr. White or Mr. Block took into consideration or even discussed

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rights matters;" that he was involved in certain issues relating to age, relating to collective bargaining . . . I was just a messenger;" and that the activities were "pursuant to GAO orders and instructions." Tr. 29-30, 66, 71.

Petitioner's involvement in *Chennareddy*. Petitioner's only testimony regarding comments from managers as to his "civil rights activities" was that there were "comments." Tr. 32. Petitioner's only recollection was that these comments were "more of 'You have better things to do' type of approach." *Id.* He also alleged that he received a memorandum from the Comptroller General advising him to "cut it out." Tr. 144. However, he failed to present this memorandum.

On this record, the actions under review must be examined to determine if there is a causal connection with Petitioner's protected activity. Petitioner alleges that three actions were taken in reprisal for his protected activity: (1) the two-day suspension in April 1999; (2) his performance appraisal for the IRS seizure job dated February 1999; and (3) his performance appraisals for the IRS payroll job covering from February to September 1999.

a. The Suspension

Petitioner alleges that:

> the charges and specifications for the charges leading to the suspensions (sic) complained of and directly resulting effect upon petitioner's career are false. The persons who brought those charges, on information and belief, were told to do so by their superiors for reasons of reprisal for civil rights activities . . .

Petition at 3. However, Petitioner never provided any evidence, other than his own testimony, to support this allegation.[10]

Petitioner attempts to prove that the suspension constituted a prohibited personnel practice because the underlying charges and specifications were false, with reprisal as the actual reason for the suspension. Petitioner was charged with unprofessional conduct on April 1, 1999, in a letter proposing his suspension. R.Ex. 201. He submitted his written response on April 8, 1999. R.Ex. 202. The Agency decided to suspend him on April 12, 1999. R.Ex. 204. The charge involved three specifications: (1) failing to contact his supervisors when instructed to do so; (2) behaving disrespectfully toward his supervisors; and (3) using abusive language in communicating with his supervisors. As discussed below, the Agency provided sufficient evidence to support the specifications and thus, suspend Petitioner.

i. Specification 1 — Refusal to Meet with Supervisors

The first specification, failure to contact supervisors, is based on seven incidents described below.

The first incident occurred on February 12, 1999. R.Ex. 201 at 1. Petitioner allegedly advised Mr. Richards that he would not participate in a meeting regarding his performance appraisal. By

[10] The Petition also alleges that Ann Lee "would surreptitiously provide Mr. Richards information via e-mail and telephone conversations about Petitioner's purported failures or misdeeds without his knowledge or opportunity to respond." Petition at 5. However, Petitioner made no attempt to substantiate these allegations during the hearing.

memorandum to the file, Mr. Richards noted that Petitioner had stated he would not participate in such a "circus" and that he would not be participating in the meeting. R.Ex. 180. In his response to the proposal, Petitioner merely denied telling Mr. Richards that he would not participate in the meeting; he did not deny stating that he would not participate in such a "circus." R.Ex. 202 at 1. Even assuming Petitioner did not explicitly state he would not participate in the meeting, his statement regarding not participating in circuses is consistent with subsequent e-mails that he sent to his supervisors. It was reasonable under the circumstances to interpret his statement as a refusal to participate in the meeting.

The second incident involved a February 23 e-mail message from Petitioner in response to an e-mail from Mr. Richards stating that he wanted to schedule a meeting. R.Ex. 201 at 1. Petitioner's e-mail reiterated that he did not participate in "circuses" and warned his supervisor not to "push your luck with me because I'm not in the mood." R.Ex. 183. Further, Petitioner stated that he was not sure if the push by Richards was based on "naiveté or plain stupidity." *Id.*

In his response to the proposal, Petitioner denied that he stated he would not participate in a meeting. R.Ex. 202 at 2. Instead, he explained that the e-mail indicated that the meeting would not be fruitful at that time. *Id.* He further claimed that he did not believe that the request to schedule a meeting constituted a directive.

I find Petitioner's response on this specification not credible. Petitioner specifically stated again: "I told you that I did not participate in 'Circuses'." R.Ex. 183. Thus, Petitioner's own e-mail supports his supervisor's record of the communication, *i.e.,* that he stated that he would not participate in the meeting. Regardless of whether an employee believes that a meeting will be fruitful, if his supervisor requests a meeting it is incumbent on the employee to attend. Petitioner's opinion about the meeting's prospects does not entitle him to refuse to comply. This situation does not fall within the limited exceptions such as avoiding danger or illegal action that may excuse an employee from compliance with a supervisor's directive. *See Meads v. Department of Veterans Affairs*, 36 MSPR 574, 578-79 (1988).

Petitioner's claim that he did not believe that the request was a directive is not credible. Mr. Richards' e-mail specifically stated, "we need to schedule a meeting." R.Ex. 183. Any reasonable person would conclude that, coming from a supervisor, this was not a mere request but a directive. Furthermore, subsequent e-mails sent to Petitioner stated that his refusal to meet could be subject to disciplinary action.

The third incident involved Mr. White's attempts on February 23 to schedule a meeting with Petitioner. R.Ex. 201 at 1. Mr. White left two voice mail messages and sent an e-mail to Petitioner to try to set up the meeting. The e-mail also directed Petitioner to stop including other co-workers in the e-mail exchange. Petitioner's only response was to send an e-mail message citing federal cases regarding e-mail messages. R.Ex. 186. However, Petitioner made no mention of the request for a meeting. Petitioner did not respond to this incident in his answer to the proposed suspension.

The fourth incident involved a February 26 voice mail message, in which Mr. White indicated that he wanted to meet with Petitioner on March 7. R.Ex. 201 at 2. On March 1, Petitioner

responded by e-mail that he would not engage in the meeting. R.Ex. 189. In his response to the proposal, Petitioner denied having said that he would not participate in this meeting. R.Ex. 202 at 2. Petitioner also claimed that he informed Mr. Block that he would meet with Messrs. White and Richards on March 17 as requested. R.Ex. 202 at 2. Petitioner's response is not credible since his March 1 e-mail to Mr. White specifically stated "I have been advised not to engage in this and I will proceed to litigation." R.Ex. 189.

The fifth incident concerned an e-mail message that Mr. Richards sent to Petitioner on March 3, directing him to meet with Mr. Richards and Mr. White on March 17. R.Ex. 201 at 2. Petitioner, in his response, stated that he informed Mr. Block on March 3 that he received the e-mail from Mr. Richards but would not read it because he did not read messages that were sent "return receipt requested." R.Ex. 202 at 3. Petitioner also advised Mr. Block that he did not want to meet with anyone to discuss his performance. R.Ex. 201 at 2. Petitioner's response to the proposal again denied refusing to meet and explained that he expressed some reservations to Mr. Block about the utility of such a meeting but that he agreed to meet with his supervisors. R.Ex. 202 at 2. Petitioner's response again is not credible in light of his various responses where he clearly expressed his refusal to meet.

The sixth incident occurred on March 8, when Petitioner refused to meet with Mr. White without an attorney despite being advised that he could be subjected to disciplinary action. R.Ex. 201 at 2. According to the proposal letter, Petitioner responded, "Go ahead and suspend me. I'll deal with it." R.Ex. 201 at 2. Petitioner denied refusing to meet with Mr. White but did not deny the rest of the alleged statements. R.Ex. 202 at 3. Petitioner also admitted to discussing the possibility of having one of his attorneys present. His e-mail response and admitted statements are consistent with the statements as recalled by his supervisors, that he would not meet with them. *See* R.Exs. 183, 189, 202.

The seventh incident occurred on March 17, when Mr. White directed Petitioner to meet with him regarding conduct issues. R.Ex. 201 at 2. Petitioner refused to meet with him and stated that if that meant he would be suspended then he would be suspended. *Id.* In the response to the proposal, Petitioner denied refusing to meet with Mr. White but did admit stating that he did not see the point of such a meeting. R.Ex. 202 at 4.

I find that Petitioner in fact did refuse to meet with his supervisors, both explicitly and implicitly. The recollections of both Mr. White and Mr. Block of the incidents described above are more credible and Petitioner's own e-mails often corroborate the supervisors' recollections. Petitioner's statements denying a refusal to meet but expressing reservations about the purpose and success of such a meeting are disingenuous. Statements such as "I do not participate in circuses," "I have been advised not to engage in this and I will proceed to litigation," and "Go ahead and suspend me. I'll deal with it" are not consistent with a concern for the productivity of the meeting or a cooperative attitude. These statements are consistent with a refusal to meet with his supervisors.

Looking only at Petitioner's own words in his e-mails, any reasonable person would have interpreted his responses as not intending to meet with his supervisors. If in fact Petitioner did intend to meet with them, the natural response would have been to indicate when he was

available to meet. It was completely reasonable for his supervisors to interpret Petitioner's statements as an indication that he was not going to participate in the meetings. Accordingly, I find that this specification was amply supported by the evidence.

ii. Specification 2 – Disrespectful Conduct

The second specification alleges that Petitioner behaved disrespectfully towards his supervisors and managers. R.Ex. 201 at 4. The specification was based on incidents 1, 3, and 7, discussed above in the context of refusal to meet with his supervisors. Specifically, during the February 12 communication, Petitioner characterized the meeting as a "circus." On February 23, he sent an e-mail to Mr. Richards referring to the notion of meeting again as a "circus" and also stating, "don't push your luck with me because I'm not in the mood. Tom, anyone who knows me, will tell you the same thing. I am not sure how much of this push by you is naiveté or plain stupidity." R.Ex. 183.

The specification was also based on the incident that occurred on March 17, when Petitioner finally participated in the performance feedback meeting. During this meeting, he accused Mr. White of "being on a power trip" and accused Mr. Richards of not knowing what he was doing. Petitioner also turned his back on Mr. Richards and Mr. White several times and talked to them in an accusatory tone accompanied by finger pointing.

In his response to the proposal, Petitioner admitted that he characterized the meeting as a "circus," but explained that he did not believe that he was given a fair opportunity to discuss all aspects of his performance. R.Ex. 202 at 5. The decision to suspend Petitioner stated, "despite your belief, the statement you made can readily be interpreted as a disrespectful communication towards your supervisors and managers." R.Ex. 204 at 3. Regarding the February 23 e-mail, Petitioner does not deny making the statements but attributes the statements to "a reflection of my feeling of betrayal by Mr. Richards and illness." R.Ex. 202 at 5. The decision again stated, "despite what you believed and felt, the statements you made constituted disrespectful communication towards your supervisors and managers." R.Ex. 204 at 3. In response to the March 17 meeting, Petitioner stated that his behavior was not meant to be disrespectful. He did not deny making any of the statements attributed to him. Furthermore, he explained that it is his custom to jot down or type ideas and thoughts as he has them. He did deny talking in an accusatory tone and stated that he was defending himself against accusations.

Petitioner did not deny characterizing the meeting as a "circus" on February 12. His statements regarding "don't push your luck with me" are adequately supported by his February 23 e-mail and are clearly disrespectful. Furthermore, Petitioner did not deny making the statements during the March 17 meeting, only that he intended no disrespect.

I find that this specification was amply supported and that Petitioner failed to show that it was falsely raised. Petitioner's actions were both disrespectful and unprofessional. While claiming that he characterized the meeting as a "circus" because he was not given a fair opportunity to discuss all aspects of his performance, Petitioner refused to attend the very meeting in which he would have been able to talk to his supervisors about his performance. Furthermore, it was completely unprofessional to call one's supervisor naïve or stupid and to threaten them with

"don't push your luck with me." These are not words used in a workplace. Thus, the Agency has provided sufficient evidence to support the facts enumerated in Specification 2.

iii. Specification 3 – Abusive Language

The third specification alleges that Petitioner used abusive language in the March 17 meeting when he said to Mr. White, "Don't fuck with me." R.Ex. 201 at 4. Petitioner "vehemently" denied making this statement, claiming that he does not use profanity. R.Ex. 202 at 6. Initially Petitioner stated that he "did not say that and if [Mr. White] thought I did to please accept my apologies." *Id.* In the Petition and at the hearing, Petitioner subsequently stated that while he did not curse he did use a phrase from the movie "The Color Purple." Petition at 13; Tr. 105. The Petition stated that "[t]he phrase that Petitioner used is a fairly common phrase used by southerners and as a former southerner (Tennessee) that phrase is a part of my vocabulary and is not vulgar." Petition at 13. At the hearing, Petitioner testified that he did not "recall exactly what the words were in the phrase. . . . But it is a fairly common phrase." Tr. 153. His only explanation for why he could not remember the word at the hearing was because "I was disgusted and I used that phrase, which sounds like what that is … I have not been disgusted since then." Tr. 154. While he remembered that it was used in a particular movie, he could not remember what the actual phrase was. Tr. 153. And though he had four years to review the movie to refresh his recollection, during the hearing he still could not recall the particular phrase. Instead, he stated only that "I figured you could get a copy [of 'The Color Purple']." Tr. 106.

Petitioner's testimony on this issue is simply not credible. His cavalier attitude regarding the phrase that he used placed considerable doubt on Petitioner's version of what occurred.[11] Additionally, Petitioner did not explain to his supervisors initially that he did not use this phrase. Instead he merely said that it "slipped out." R.Ex. 200 at 2. Later, in his response, Petitioner claims he apologized to Mr. White if that's what he heard. R.Ex. 202 at 6. Furthermore, if this phrase was such a regular part of his vocabulary and is a "fairly common phrase," it is difficult to believe that he would not now remember the actual phrase that he allegedly used.

GAO's Table of Penalties provides that for a charge of unprofessional conduct, an employee may be subject to discipline ranging from reprimand to removal. Order 2751.1 Supp. at A1-5 ¶3.m (June 10, 1994). A two-day suspension is within the range of acceptable penalties for a charge of unprofessional conduct. I do not find any reason to reverse the Agency's action. The Agency provided specific, credible proof of the incidents underlying the suspension. Petitioner has failed to provide any evidence that the Agency acted unlawfully in imposing the suspension.

[11] This cavalier attitude was presented several times during Petitioner's testimony and significantly placed into question his credibility and seriousness regarding the hearing. This is particularly true because Petitioner was represented by counsel who should have known the necessary elements and evidence required to prove his case. Other examples of Petitioner's lack of seriousness included his failure to provide a list of exhibits or witnesses, other than Petitioner, or to even talk to witnesses prior to trial, failure to review the documents presented by the Agency prior to hearing, and his reference to his supervisors with such phrases as "dodo" and "dumb and dumber." Tr. 109, 117, 120.

b. Performance Appraisals for the Seizure and Payroll Jobs

Petitioner claims that the February, June, and September 1999 performance appraisals did not accurately reflect his performance and were instead motivated by reprisal for his protected activities. He challenges the accuracy of these appraisals on the basis that he allegedly never received expectations, and that the instructions for filling out DCIs had changed without notice to him. Petition at 5-6; Tr. 56, 547. Petitioner also alleges that there was no evidence that his performance was defective. Tr. 590.

i. Expectations

Petitioner alleges that he never received expectations for either the seizure job or the payroll job. Tr. 72; Petition at 5-6. Petitioner's counsel in his closing statement even argued that this is undisputed. Tr. 584. However, Mr. Block testified that he prepared and gave Petitioner his written expectations for the seizure job, and also wrote them for other staff on the project. Tr. 461-62, R.Ex. 131. Mr. Block also testified that he gave verbal expectations to Petitioner for the payroll job. Tr. 424, 459, 486.

The issue of whether a failure to provide expectations is a prohibited personnel practice has been addressed in several MSPB cases. Under governing precedent, when an employee contends that an agency has not communicated performance standards and critical elements, the agency must prove by substantial evidence that the employee was made aware of and understood the standards and elements in question at the beginning of the appraisal period that forms the basis of the underlying action. *See Papritz v. Department of Justice*, 31 MSPR 495, 497 (1986).

In *Papritz*, it was sufficient that the employee had been made aware of the substance of his critical elements upon joining the agency two years earlier; that he received instructions about his performance standards and agency expectations regarding his assignments; that based upon his previous experience and receipt of his position description, he was aware of what the duties of his position entailed and that he received counseling concerning his performance deficiencies prior to the opportunity period. *Papritz*, 31 MSPR at 498. The MSPB has also found that discussion of performance standards may occur "in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements against which he is to be measured." *Donaldson v. Department of Labor*, 27 MSPR 293, 298 (1985).

Even assuming that Petitioner did not receive written expectations, testimony at the hearing clearly showed that Petitioner received feedback throughout the seizure job. Mr. White testified that Mr. Richards and others gave Petitioner feedback and guidance regarding his performance. Tr. 231-32, 309. Mr. White also stated that Petitioner received expectations in the form of formal expectations and less formal feedback. Tr. 305, 309, 395. In addition, there was testimony that Mr. Venezia gave Petitioner "continuous extensive feedback" about the kinds of mistakes he was making. Tr. 98, 398, 508.

While Petitioner attempted to deny receiving any feedback, he did admit that he received instructions on occasion. Tr. 95. He also denied being told that his production was too slow or

deficient. Tr. 39. Petitioner was also asked during the hearing whether he ever asked for expectations; his response was that it was not his job to do so. Tr. 562. However, as an evaluator/analyst, it is Petitioner's job to understand what his responsibilities were and if he did not understand what they were, then he should have made it his job to find out. Petitioner was given adequate opportunity to inquire as to what was expected of him. He was involved in the planning of the seizure job and even voiced his opinion regarding how the assignment should be carried out. Tr. 132. The staff as a whole was trained and had meetings with Mr. Venezia on how to fill out the DCIs. Tr. 98, 362, 508-09. It was important that everyone received the same instructions in order to ensure consistency with the DCIs. Tr. 362. This record leads only to the conclusion that expectations and instructions were communicated to the staff, including Petitioner.

Petitioner also alleges that the instructions for filling out the DCIs on the seizure project changed repeatedly. Tr. 546, 584. During the hearing, he stated that "some [instructions] I got, some I didn't." Tr. 546. He further alleged that Ann Lee wouldn't distribute the information. However, Petitioner presented no evidence to corroborate this allegation and I attach no credit to this allegation.

Regarding the payroll job, Mr. Block testified that he gave Petitioner continuous feedback and that Petitioner received verbal expectations, including instructions on how the summary schedule of the interviews should be done. Tr. 486. He also discussed with Petitioner the need to complete the interviews on time. Tr. 428. Mr. Block further testified that Petitioner never indicated that he did not understand his expectations. Tr. 425.

Thus, Petitioner failed to prove that the Agency engaged in a prohibited personnel practice by not giving Petitioner his expectations for either the seizure or payroll job.

ii. Petitioner's Performance

Petitioner alleges that his performance was "improperly assessed because of bias and reprisal." Petition at 1. Petitioner's performance ratings were based on his performance during the seizure job and the payroll job. However, as discussed below, the Agency has provided evidence to establish that the performance ratings that Petitioner received but never reviewed were justified, *i.e.*, based on his actual performance.

The Agency proferred the testimonies of Petitioner's supervisors, Messrs. White and Block, regarding the reasons for the rating on the seizure job. Specifically, Mr. White testified that Petitioner's DCIs were not usable because they had multiple errors and had to be redone. Tr. 216-24. The team members, including Petitioner, reviewed each other's DCIs. Tr. 324-26. However, compared to other team members' work, Petitioner's work had many more errors. Tr. 338, 537. Mr. White also testified that Petitioner was held to the same standard of analysis as everyone else. Tr. 348. In addition, Petitioner was very slow in completing DCIs and consequently other team members fell behind in reviewing them. Tr. 316. Mr. White further testified that while he did not compute an error rate,[12] he did see the "number and magnitude and

[12] During the hearing, Petitioner attempted to allege that the Agency was required to provide a statistical analysis of Petitioner's error rate in comparison to other employees. Tr. 325-27, 343. However, there is

seriousness of the errors." Tr. 319. He further verified through talking to other people who reviewed Petitioner's work that they all had the same problems with Petitioner's DCIs. Tr. 319.

Mr. Venezia corroborated these errors. He testified that as the technical advisor, he reviewed the DCIs of all the team members, and found that Petitioner had more errors than other team members. Tr. 509, 537.

Accordingly, the Agency provided sufficient evidence to support Petitioner's performance rating on the seizure job. Petitioner has failed to prove that the Agency engaged in any prohibited personnel practice regarding the February 1999 performance appraisal.

On the payroll job, Mr. Block testified that he reviewed Petitioner's work and gave him feedback throughout the assignment. Tr. 460, 486. He further testified that he had cautioned Petitioner about the amount of time it was taking him to summarize interviews. Tr. 428. Specifically, Mr. Block stated that one review of 54 interviews showed that 44 of the interviews had at least one error, thus making them "incomplete or inaccurate or both." Tr. 429. During the hearing, Mr. Block explained the types of errors that Petitioner made. Tr. 439-47. These included incomplete summary schedules and inaccurate reflections of what the interviewee stated. *Id.* Thus, the Agency provided ample support for the rating on this assignment.

On the other hand, Petitioner failed to present any evidence that the Agency engaged in any prohibited personnel practice regarding his performance appraisal for the payroll job. His only evidence that any reprisal took place was his own testimony.[13] In particular, when questioned at the hearing about what evidence he had that Tom Schulz, the San Francisco Regional Manager, had retaliated against him, Petitioner testified that the only evidence that Mr. Schulz participated in the conspiracy and retaliation against him was "environment," *i.e.* that Mr. Schulz was "not in line on the job. He had no business intervening" and that he was "sucking up" to Mr. White. Tr. 116. Petitioner also testified that Mr. White was retaliating against him because Mr. White sent information about him to upper Management and suspended him based on lies. Tr. 116-17. Petitioner further testified that Mr. Richards retaliated against him because Petitioner criticized the planning of the seizure job and also because Mr. Richards was a "dodo." Tr. 117-18. Regarding Mr. Block, Petitioner testified that Mr. Block retaliated against him because "Washington was mad at [Petitioner] because [he] criticized the seizure job and Block went along with it." Tr. 119, 121. Lastly, Petitioner testified that Ann Lee retaliated against him because he criticized her and called her "dumb." Tr. 121-22.

Even assuming that these supervisory personnel acted in any negative manner against Petitioner for the reasons he put forth, these are not reasons prohibited under 5 U.S.C. §2302. Petitioner

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no requirement to provide a statistical or quantitative analysis. *See Chaggaris v. GSA*, 49 MSPR 249, 254 (1991) (quantitative measurements are not required in all performance standards; performance standards are not invalid because they allow subjective judgments by an employee's supervisors, particularly where the type of professional judgment is not susceptible to a mechanical rating system); Tr. 326-27 (Mr. White testified that there were different types of errors).

[13] Despite being represented by counsel Petitioner clearly did not have an understanding of what was necessary to prove a prohibited personnel practice under 5 U.S.C. §2302(b)(9).

has failed to show that the allegedly retaliatory appraisals were not a result of his poor performance. The Agency carefully presented testimony and documentary evidence of Petitioner's work showing that he did not perform adequately on these assignments.[14]

Accordingly, Petitioner has failed to prove that the Agency has engaged in any prohibited personnel practice regarding his performance appraisals or the suspension.

B. Title VII Claims

The Petition for Review "seeks a finding of intentional reprisal and a conspiracy to violate his civil rights in violation of Title VII, … and the anti-conspiracy provisions of 42 U.S.C. §1983 *et seq*. incorporated into Title VII…." Petition at 3.[15] Accordingly, Petitioner's only articulated claim under Title VII would be based on retaliation. However, Petitioner's claims must fail because he has not exhausted his administrative remedies under Title VII. Even assuming that he did exhaust his administrative remedies, Petitioner nevertheless has failed to prove that he has been retaliated against under Title VII.

1. Exhaustion of Remedies

Title VII is the exclusive remedy for federal employees for alleged discrimination on the basis of race, religion, sex or national origin in federal employment. *Brown v. GSA*, 425 U.S. 820, 835 (1976). Under Title VII, a litigant must exhaust available administrative remedies in a timely fashion. *Id.* at 832. The administrative remedies available to Petitioner are found in GAO Order 2713.2, Discrimination Complaint Processing (Dec. 2, 1997). Order 2713.2 requires that an employee alleging discrimination must "contact a civil rights counselor within 45 days of the date of the matter alleged to be discriminatory." Order 2713.2, ch. 3, ¶1.a(1). If the issue has not been resolved satisfactorily for the aggrieved person during the counseling period, the counselor must notify the individual in writing of the right to file a formal discrimination complaint. Order 2713.2, ch. 3, ¶1.d.

To continue fulfilling the requirement of exhausting administrative remedies, a complainant must then file a formal EEO complaint within fifteen days of receiving notice of the right to file a discrimination complaint. Order 2713.2, ch. 3 ¶1.d(1). This formal complaint filing triggers the requirement that the Agency investigate the allegations. It is a necessary prerequisite to filing a Title VII charge with the PAB/OGC and the PAB (4 C.F.R. §28.98(a)), or to filing a Title VII-based civil action in federal district court. *See* Order 2713.2, ch.6, ¶¶2, 4. The Board's

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[14] Even assuming that Petitioner could show that he deserved a higher rating, this Board would not have the authority to give the higher rating unless Petitioner had proved that his rating was based on a prohibited personnel practice. "Challenges to performance appraisals in and of themselves do not constitute separate claims cognizable under the Board's jurisdiction." *Poole v. GAO*, PAB Dkt. No. 98-01 (June 30, 1999), slip op. at 24. Petitioner's remedy for an erroneous rating would have been through the administrative grievance procedure. *See* GAO Order 2531.3, ch. 4, ¶1.

[15] Petitioner initially raised a claim under the ADEA, but later withdrew that portion of the Petition. Tr. 20.

jurisdiction over discrimination claims is generally limited to appeals for claims timely made to the GAO Office of Civil Rights (now the Office of Opportunity and Inclusiveness).

In this case, Petitioner provided no evidence—nor is there any record proof—that he ever initiated contact with an EEO counselor or that he filed an EEO complaint with the Office of Civil Rights.

2. Petitioner's Burden

Even assuming that Petitioner had successfully exhausted his administrative remedies for filing a claim under Title VII, Petitioner has failed to meet his burden of proof regarding an allegation of reprisal based on his civil rights activities. Under Title VII, Petitioner has the initial burden of persuasion to establish a *prima facie* case of discrimination or retaliation. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). To establish a *prima facie* case of retaliation under Title VII, an employee must show that: (1) he engaged in protected activity; (2) the accused official knew of such activity; (3) he was subjected to an adverse personnel action; and (4) there is a causal connection between the protected activity and the adverse personnel action. *Bolling v. Department of the Navy,* EEOC Appeal No. 01A20601, 2003 WL 21423777 (June 12, 2003).

If Petitioner meets his initial burden, the Agency is then given an opportunity to establish a legitimate nondiscriminatory reason for its actions. *Burdine*, 450 U.S. at 253. However, the Agency's burden is only that of production, the burden of proving discrimination always stays with Petitioner. The burden then shifts to the Petitioner to prove that this legitimate nondiscriminatory reason is a pretext for the Agency's actions. *Id.*

In *Burdine*, the Supreme Court held that the employer's explanation for its actions must be legally sufficient to justify a judgment for the employer. *Id.* at 255-56. The EEOC has interpreted the term "legally sufficient" to mean that the explanation is set forth with sufficient clarity to allow the employee a full and fair opportunity to demonstrate pretext. *Parker v. USPS*, EEOC Request No. 05900110, 1990 WL 711458 (Apr. 30, 1990). Employers generally have broad discretion to set policies and carry out personnel decisions, and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. *See Burdine*, 450 U.S. at 259. Consequently, even if more than one conclusion can be drawn from the evidence, the agency's decision stands if it is supported by substantial evidence. *Stevens v. Stubbs*, 576 F. Supp. 1409, 1413 (N.D. Ga. 1983) (*citing Deutsch v. Atomic Energy Commission*, 401 F.2d 404 (D.C. Cir. 1968)). An agency meets its burden of production if it introduces evidence sufficient to allow the trier of fact rationally to conclude that the agency's action was not based on unlawful discrimination. *Burdine*, 450 U.S. at 257.

When the agency advances a legitimate, nondiscriminatory reason for its action, it is not necessary to address the issue of whether the complainant has established a *prima facie* case, since there is enough evidence to make a decision on the merits of the complaint. *Kornis v. International Trade Commission*, EEOC Request No. 02840001, 1987 WL 774236 (1987) (*citing United States Postal Service v. Aikens*, 460 U.S. 711, 715 (1983)). In this case, since the Agency has already come forward with a legitimate nondiscriminatory reason for its actions, it is

unnecessary to address the question of whether a *prima facie* case was established.[16] The question then becomes whether Petitioner has shown that the Agency's reasons were pretext for reprisal.

3. Adverse Employment Actions

a. Suspension

It is unclear whether Petitioner is alleging that the suspension was imposed for discriminatory reasons. However, to the extent that Petitioner is alleging that he was suspended in retaliation for his civil rights activities, Petitioner adduced no evidence in support of such a claim.

Petitioner makes several claims that the charges raised against him were false. He also claims that the "persons who brought those charges, on information and belief, were told to do so by their supervisors for reasons of reprisal for civil rights activities." Petition at 3. However, Petitioner failed to present any evidence to support these allegations.
The Agency, on the other hand, detailed several incidents with documentary evidence and testimony to support its decision to suspend Petitioner for two days. The two-day suspension was within the Agency's Table of Penalties for the offenses, and thus, within the Agency's discretion. Petitioner has not provided any evidence to show that the Agency's actions were not supported by substantial evidence and that the Agency's actions were pretext for reprisal.

In fact, Petitioner himself stated that the reasons his supervisors retaliated against him by suspending him were because he criticized them, and the work "environment." Tr. 116. He also claimed that one of his supervisors—Mr. Richards—retaliated against him because Mr. Richards was a "dodo," and that another co-worker who supervised some of his work—Ann Lee—retaliated against him because she was "dumb." Tr. 116-17. Even if these reasons were proven true, they do not rise to the level of protection under Title VII.

Accordingly, I find that Petitioner has failed to meet his burden of proof and has not established that the Agency's reasons for the suspension were pretext for retaliation.

b. Appraisals

Petitioner also alleges regarding his performance appraisals that "he was singled out for disparate treatment." Tr. 584. He contends that there was no evidence that his performance was defective. Tr. 590. Instead, he testified that he never received expectations and the instructions for filling out the DCIs had changed without notice to him. Tr. 56, 546-47. As his attorney explained, Petitioner alleges that he "was treated differently from the other employees . . . in that he and his personal work product were singled out for analysis and criticism, and no one else was." Tr. 604.

As discussed above, the Agency provided sufficient evidence to establish a legitimate non-discriminatory reason for rating Petitioner's performance at the "needs improvement" level. In

[16] This is not to imply that Petitioner has in any way established a *prima facie* case.

order to succeed in his claim of retaliation, Petitioner was then required to show that the legitimate non-discriminatory reason was pretext for retaliation.

Messrs. White and Venezia testified that they reviewed Petitioner's DCIs as well as those of everyone else on the team. Tr. 319, 508. During Mr. Block's testimony, he reviewed Petitioner's summary schedules of interviews he had conducted and explained why they were incorrect and why they needed to be redone. Tr. 439-57. Petitioner's only explanation for his deficiencies was that he did not receive his expectations and that the instructions for filling out the DCIs were changed without notice to him. Tr. 72, 546. Even assuming that Petitioner's testimony was credible that he did not receive expectations, Petitioner failed to provide any evidence that his co-workers, who had not participated in protected activities, were treated more favorably. He also makes no mention of whether the other team members had received the changed instructions that he alleges existed.

Thus, I find that Petitioner failed to prove that the Agency's reasons for its actions were a pretext for retaliation.

III. Conclusion

Petitioner has failed to prove by a preponderance of the evidence that the Agency engaged in prohibited personnel practices when it rated Petitioner a "needs improvement" in his February 1999 and September 1999 performance appraisals. He also failed to prove that the Agency engaged in prohibited personnel practices when he was suspended for two days for unprofessional conduct. Petitioner also failed to prove that the Agency's legitimate nondiscriminatory reason for Petitioner's performance ratings and the two-day suspension were pretext for retaliation.

Accordingly, the Petitioner's request for relief is **denied** and the Agency action is affirmed.

SO ORDERED.